RELATIONSHIP BETWEEN INVESTIGATOR AND PROSECUTOR IN DRAFT OF INDONESIAN CRIMINAL PROCEDURAL LAW (RKUHAP)

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Abstract

After 10 years being formulated, draft of Indonesian Criminal Procedural Law (RKUHP) is finally submitted and discussed in DPR. However, there are some rejections in the discussions, such as the elimination of "investigation" as well as the establishment of Preliminary Examination Judge (HPP) RKUHAP.

Relationship between Investigator and Public Prosecutor is formulated in the form of "initial investigation" combined under the "investigation" chapter. In addition, to facilitate the relationship, notification for the commencement of investigation may be conducted through various communication means with local prosecutor (jaksa zona). Therefore, there won't be any case goes "back and forth" again, and cooperation between investigator and public prosecutor will still continue until court trial. One of the objectives for establishing HPP is to meet the mandate of International Covenant on Civil and Political Rights (ICCPR). This article explains the relationship between investigator and public prosecutor as well as the background for establishing HPP in RKUHAP.

Keywords: Investigator, Public Prosecutor, Preliminary Examination Judge

A. Introduction

Globally, there are two stages of criminal justice process, i.e. preliminary examination and trial examination stage. Preliminary examination stage consists of investigation and prosecution stage. A red line cannot be made between investigation and prosecution, it can be differentiated, yet still inseparable. There is also an intermediate form between preliminary examination and trial examination stage, namely pretrial justice.

Pretrial justice comes in many forms in various modern countries. In Netherland, it is called *Rechter Commissaris* and *juged'instruction* in France. Pretrial

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justice used to be called *Unschuhungsrichter* in Germany and *Giudice Istructtore* in Italy, which both are already eliminated. In Spain, pretrial justice is called *Juez de instruccion* that still has the same authority. Some parties wanted to reduce the authority and transferred it to prosecutor, however there are still parties who disagree with this concept. Meanwhile, the authority of *Juged'instruction* in France is already reduced and transferred to prosecutor. In Germany, the authority of *Unschuhungsrichter* is already eliminated and also transferred to prosecutor.

For detention, *Giudiceperle Indagini Preliminari* (preliminary examination judge) is established. In France, the authority for detention is used to be in the hand of *juged'instruction.* However, a special judge called *juge deliberteet de la detention* (release and detention judge) is now established. The word release is put in front, which means that detention is an *ultimum remedium*.

Unlike in Indonesia, detention is made as *premium remedium*, since detention is somewhat seen as "sentence advance" ("*panjar hukuman*"). While detention is actually for the effectiveness of examination. Hence, contradictory in Indonesia (specifically KPK), only when examination is finished, then the suspect shall be arrested (e.g. Andi Mallarangeng and Anas Urbaningrum case). When preliminary evidence is obtained, it should actually be enough to make arrest. After examination is finished, the suspect may stay out of detention as long as the suspect does not show any sign of escape, reiterating his/her action, or eliminating evidence.

Initially, there were only few modifications being made in RKUHAP compared to the existing KUHAP. However, with the ratification of *International Covenant on Civil and Political Rights (ICCPR)* in which full with provisions related to human rights (HAM), specifically forcible effort for detention, some fundamental changes were made in the formulation of RKUHAP. According to ICCPR, principally, judge is the one authorized for detention, prior to briefly examining the suspect who is physically presented with the prosecutor as well as the police (investigator). Hence, in RKUHAP, a special judge was established, called "**Preliminary Examination Judge (HPP)**" that coincidently has similar meaning with *Giudiceperle Indagini Preliminari* in Italy, which just recently established.

After all the hard work, RKUHP was finally submitted and discussed in DPR. However, some objections were made in the discussions. Although, prior to being sent to DPR, in order to avoid different opinions among governmental elements (Minister of Law and Human Rights, Attorney General and Head of National Police/*Kapolri*), the Minister of Law and Human Rights by order of the President, has asked officials to give their signatures on every page of RKUHAP. The Minister of Law and Human Rights, Attorney General and Kapolri also have

given their signatures on RKUHAP, page by page, as their form of approval to the draft. Unfortunately, during the discussions in DPR, POLRI official protested the elimination of "initial investigation" in the draft, including the establishment of HPP in RKUHAP. Hence, this article will explain the relationship between investigator and public prosecutor as well as the background for establishing HPP.

B. Relationship between Public Prosecutor and Investigator

In general, the relationship between public prosecutor and investigator is regulated under Article 108 and 110 of KUHAP. Immediately after the commencement of investigation, investigator informed prosecutor through notification letter for the commencement of investigation. Yet, in practice, without any information of *delict* in which should be informed to prosecutor through this letter, it is very difficult for investigator. Moreover, prosecutor gave the lead/ instruction only after filling is finished. With the system called as "P19" (lead to investigator), before prosecutor stated that an examination is done and issued P21, case dossier shall go back and forth between investigator and prosecutor. When prosecutor issued "P21" it means that the case has been properly accepted by prosecutor. After "P21", automatically the relationship between investigator and prosecutor is then finished.

This stage of "back and forth" is called by KUHAP drafting team as "pre-prosecution". Due to this "back and forth" process between investigator and prosecutor, based on the research done by attorney in the last 10 years, there were 550,000 cases missing. In other words, 50,000 cases missing in a year or 5,000 cases missing in a month. This condition is very upsetting for the justice seekers (victims). This is not the investigator or prosecutor's fault, it is the system. Based on the system established by KUHAP, the authority for investigation is fully within the hands of investigator (police). Hence, investigation sovereignty is only in the hands of police in which cannot be argued. Therefore, Civil Servant Investigator (PPNS), *Penyidik Pegawai Negeri Sipil* (PPNS), which amounted to around 70 (seventy) agencies, should go to POLRI first before handing over cases to prosecutor. This provision is very unnecessary, time consuming, and a lot of this provision is being ignored.

In other countries, all cases from civil servant (civilian) is sent directly to attorney. Attorney becomes the coordinator for investigation. In Indonesia, there is deviation against provision in which regulated globally, namely administrative law with heavy criminal sanction. As a comparison, in other country such as

Netherland, the highest sanction of administrative law is 1 year in prison or penalty fee because the purpose of criminal sanction in administrative law is not to punish people, but only to have the law obeyed. Therefore, in Netherland, criminal sanction for environmental *delict* is included under WED (*Wetopde Economische Delicten*) to "contain" or "cover" it with criminal law. Hence, the authority of civil servant investigator (civilian) is **not major** and **unimportant**. Thus, Indonesia has deviated far from global system, sanction of administrative law is relatively heavy, way heavier than sanction in KUHP.

In addition to sanction of administrative law that impose a heavy criminal sanction, there is also special minimum criminal. Furthermore complicated, there is also *delict* formulation and sanction of administrative law in which overlapped. Example: provision on the prohibition to clear land through burning mechanism as stated in Article 69 paragraph (1) letter h in conjunction to Article 108 of Law No. 32 Year 2009 on Environmental Protection and Management, which is overlapping with Article 48 paragraph (2) of Law No. 18 Year 2004 on Plantation that also gives criminal sanction for intentional action in clearing and/ or processing land through burning. Hence, Law on Environmental should not be applied as *legi generali*, since Law on Plantation as *lex specialis* is also related to environment in micro manner. Oddly enough, Law on Environmental was more recent (2009) compared to Law on Plantation (2004). Legislator should have known that land burning is already regulated in Law on Plantation. This type of instruction should have been given by prosecutor who should know about criminal law, like in Netherland where they have special prosecutor for environmental issues.

To facilitate the relationship between investigator and prosecutor, in RKUHAP and implementation Government Regulation Draft (RPP), it is regulated that notification for the commencement of investigation does not necessarily require a letter. It can be done via telephone, sms, e-mail, or verbally during the commencement of investigation in which instruction is given at the same time. To furthermore facilitate the communication between investigator and prosecutor, RPP also regulates about "special prosecutor", namely "local prosecutor" ("*jaksa zona*"), who directly receives phone call, sms, e-mail, etc. and gives instruction. "*Jaksa zona*" exists in every attorney, such as in Attorney of South Jakarta (*jaksa zona* of Kebayoran Baru). Thus, all cases occur in Kebayoran Baru shall be notified to the local prosecutor of the area. In order to prevent collusion between investigator and *jaksa zona*, the position shall be rotated every year.

All of these processes happen prior to filing. Hence, there won't be any case goes "back and forth", no more "P19" as well as "P21". Cooperation between

investigator and attorney/public prosecutor shall continue until court trial since RKUHAP refers to *semi adversial* system. In this system, both public prosecutor and legal advisor/defendant may add witness or new evidence during court trial. Therefore, public prosecutor may ask investigator to add investigation in the form of new witness to counter new witness proposed by legal advisor/ defendant. In France, there is no local prosecutor, yet there is duty prosecutor who awaits at the office for phone call to start investigation and to give direct instruction.

In order to have this cooperation, prosecutor with perfect knowledge of criminal law is required, specifically for *jaksa zona*. To anticipate the application of new KUHAP, since Attorney General Hendarman Supanji, admission of new attorney/prosecutor has been tightened in which education requirement has also been escalated. Furthermore, for *jaksa zona* position, education requirement should be at least Master's Degree in Criminal Law. The result shows that based on the assessment conducted by Department of Justice, United States of America, education for Indonesian prosecutors 2010-2011 is the best in Asia Pacific, so that Jakarta ends up chosen as the meeting venue for Asia Pacific's Attorney Generals.

In regards to investigation authority of attorney, there are four groups of arrangement, as described in the following:

1. First group, prosecutor is authorized to investigate and supervise investigation. This arrangement is followed by almost every country in European Union, except Malta. For example in Netherland, based on Article 141 Sv (Netherland's KUHAP), the first party **burdened** with investigation is *Officier van Justitie* (Prosecutor), second party is state police, etc. Since Netherland's KUHAP describes about "burden" not "authority", then generally prosecutor does not conduct daily investigation, because he/ she has already supervised the investigation. Included in the first group are Japan and South Korea. Japan actually conducts investigation. Japan's prosecutor investigates 1% of cases, while policy handles 99%. Subject to be investigated by Japan's prosecutor usually relates to state official, chairman and secretary general of political party. Chile's prosecutor also conducts investigation, including report of *delict*/crime to prosecutor in which then forwarded to the police.

2. Second group, prosecutor investigates specific *delict* or subject. Included in this group is Russian Federation (KUHAP 2004), Georgia (KUHAP 2013), and PRC. In Russia, there are several articles in KUHP that regulate prosecutor to be able to investigate, including crime against public order, *delict* conducted by military civilian, *delict* occurred in military area, people

in military training, etc. Similarly in Georgia, if president or governor of central bank performs *delict*, then prosecutor is the investigator. In PRC, for *delict* related to misuse of power (corruption), torture during interrogation, prosecutor is also the investigator.

3. Third group, prosecutor does not investigate, but supervise investigation, i.e. England and Wales.

4. Forth group, prosecutor does not investigate as well as supervise investigation, i.e. Malta.

This RKUHAP is created based on two mottos, shall not be dragged from **sectoral interest** and all state officials are **considered honest**. Honesty and integrity issue of state officials go back to respective institutions, starting from recruitment to career path. RKUHAP is created for the future, not present. It is created for the people and country, not for the interest of specific groups. This is a codification not regular law in which applied for every person in Indonesia, including foreigner. It even applied in the world for specific *delict*, such as money forgery, terrorism, or Human Rights violation.

There is a bad practice in Indonesia, which is when someone is "established" as suspect in which clearly conflicted with the principle of *presumption of innocent* (UK), *presumptive van on schuldig* (Netherland), *presumption des innocence* (France). People examined as suspect without giving "label" by "establishing" them as suspect. Other bad practice is when investigators (attorney, police and KPK) often give comments or even hold press conference concerning the investigation progress in which also conflicted with the *presumption of innocence* and provides opportunity for suspect to eliminate evidence and means of proof.

"Initial investigation" is said to be eliminated in RKUHAP, while actually combined under "investigation" chapter. The purpose of this is to eliminate "bridge" between initial investigation and investigation. Violation of criminal justice practice is actually happened in Indonesia, such as "bridge" between initial investigation and investigation, causing the practice for announcing that investigation is completed and escalated into investigation and "establishing" suspect. This practice violates the presumption of innocence. There should be no "establishment" of someone as suspect, even more through press conference.

France *Code Penal* (KUHP) provides criminal sanction against people who inform investigation progress. Thus, initial investigation and investigation are combined in one chapter. It will certainly difficult is RKUHAP is read using existing KUHAP "glasses". In all KUHAPs in the world, there is no separation between initial investigation and investigation, all are combined under "investigation" chapter.

C. Preliminary Examination Judge (HPP)

Other issue that is continuously debated is the establishment of an institution called "**Preliminary Examination Judge (HPP)"**, which called *pretrial justice* in other countries. In the existing KUHAP, there is already an institution called pretrial judge. The differences are: *first,* HPP is separated from the district court, independently established under the control of the high court; *second,* HPP is authorized for detention as well as physical examination of the suspect before signing warrant of detention. This authority is in line with Article 9 of *International Covenant on Civil and Political Rights* that has been ratified by Indonesia.

If there is no institution such as HPP, then duty judge must be available for 24 hours shift in a week to sign the warrant of detention. This mechanism is applied by Thailand. A reason stating that there is no district court judge willing to be preliminary judge may be eliminated when the requirement to be head of district court should go through or has been HPP in which trained to physically examine suspect and create verbal consideration on the validity and necessity of detention.

In terms of budget, there is a grace period of two years for establishing HPP after KUHAP is applied. Prior to the establishment of HPP, deputy head of district court shall carry out the responsibility as HPP. There should be no issue on office, since there will only be two rooms required, one for HPP to examine and sign the warrant of detention, and one other room for the court clerk and staff. HPP system is actually a proactive system.

Other reason is that commissioner judge (*rechtercommissaris*) has been eliminated in some countries, such as Germany and Italy. Therefore, it was not commissioner judge (like in Netherland, France, and Spain) established, which is in English called as investigation judge, but "Preliminary Examination Judge", which coincidentally is similar with *Giudice perleindagini preliminari* in Italy. In this RKUHAP, HPP cannot be called as *Investigation Judge* like in Netherland, France and Spain, because he/she does not lead the investigation. The main job of HPP is to sign the warrant of detention in accordance with Article 9 of ICCPR in which similar with France that established a new institution called *juge de liberteet de la detention* (Release and Detention Judge).

D. Closing

Drafting Team of RKUHAP has been working hard for 10 years (1999-2009) based on empirical experiences of law enforcement in Indonesia as well as comparative study to other countries. In RKUHAP, the relationship between investigator and prosecutor is strongly related to the issue on the elimination of initial investigation and the establishment of preliminary examination judge.

In reality, "initial investigation" was not eliminated in RKUHAP, but combined under the chapter for "investigation". The purpose is to eliminate "bridge" between initial investigation and investigation so that the practice of announcing the escalation from initial investigation to investigation and "establishing" suspect through press conference can be stopped. Also, in order to facilitate the relationship between investigator and prosecutor, in RKUHAP, the notification for the commencement of investigation may be conducted through various communications means with local prosecutor (*jaksa zona*). Thus, there won't be any case goes "back and forth", "P19" and "P21" will no longer exist. Partnership between investigator and prosecutor/public prosecutor will still continue until court trial.

In addition, one of the objectives for establishing HPP in RKUHAP is to align Indonesian Criminal Procedural Law with the *International Covenant on Civil and Political Rights* that has been ratified in terms of detention that should be based on court decision and suspect who should immediately go to trial.